

1 **IN THE UNITED STATES DISTRICT COURT**

2 **IN AND FOR THE DISTRICT OF DELAWARE**

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4 **TQ DELTA, LLC,** : **CIVIL ACTION**

5 :

6 **Plaintiff,** :

7 :

8 **vs.** :

9 :

10 **ZYXEL COMMUNICATIONS, INC.** :

11 :

12 **and ZYXEL COMMUNICATIONS** :

13 :

14 **CORPORATION,** :

15 :

16 **Defendants.** : **NO. 13-2013 (RGA)**

17 - - -
18 **Wilmington, Delaware**
19 **Tuesday, December 19, 2017**
20 **10:04 o'clock, a.m.**

21 - - -

22 **BEFORE: HONORABLE RICHARD G. ANDREWS, U.S.D.C.J.**

23 - - -

24 **Valerie J. Gunning**
25 **Official Court Reporter**

1 **APPEARANCES:**

2
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4 BY: **MICHAEL J. FARNAN, ESQ.**

5 **-and-**

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11 **MORRIS JAMES LLP**
12 BY: **KENNETH L. DORSNEY, ESQ.**

13 **-and-**

14
15 **ALSTON & BIRD**
16 BY: **ELIZABETH RADER, ESQ. and**
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18 **(Washington, D.C.)**

19
20 **Counsel for Defendant**
21 **ZyXel Communications**

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1 P R O C E E D I N G S
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3 (Proceedings commenced in the courtroom,

4 beginning at 10:04 a.m.)

5
6 THE COURT: All right. Good morning, and please

7 be seated.

8 This is TQ Delta versus ZyXel Communications,
9 Inc., Civil Action No. 13-2013.

10 For plaintiff, Mr. Farnan, good morning.

11 MR. FARNAN: Good morning, Your Honor. Brian
12 Farnan on behalf of the plaintiff, and with me is Jim
13 Murphy, and Peter McAndrew, all from McAndrews, Held &
14 Malloy.

15 THE COURT: All right. Good morning to you all.

16 MR. FARNAN: Thank you.

17 THE COURT: Mr. Dorsney?

18 MR. DORSNEY: Good morning, Your Honor. Ken
19 Dorsney from Morris James, and with me from Alston & Bird I
20 have Jennifer Liu and Elizabeth Rader.

21 THE COURT: All right. Good morning to you all.

22 Ms. Rader, do I presume you're making the
23 argument here?

24 MS. RADER: Yes, Your Honor.

25 THE COURT: All right. So before we begin, is

09:55:29 1 the U.K. court a troll friendly court?

09:55:33 2 MS. RADER: I would say yes, and I would say
09:55:35 3 that they would like to become more patent owner friendly
09:55:38 4 like the Eastern District of Texas used to be.

09:55:41 5 THE COURT: All right. Well, so I don't think
09:55:49 6 we really should -- you know, ad hominem sorts of things
09:55:59 7 don't really go too far, and so calling the other side a
09:56:02 8 patent troll and calling the U.K. Court a troll friendly
09:56:05 9 Court, that's not going to help you win. All right?

09:56:10 10 MS. RADER: Thank you.

09:56:11 11 THE COURT: And, Mr. Dorsney, I expect that if
09:56:15 12 you have time enough to review these briefs, and I
09:56:17 13 understand you don't always, that's the kind of thing that
09:56:20 14 you counsel your out-of-town counsel not to say.

09:56:27 15 MR. DORSNEY: Yes.

09:56:27 16 THE COURT: But I appreciate that you may not
09:56:28 17 have had the time.

09:56:29 18 All right, Ms. Rader. Go ahead.

09:56:31 19 MS. RADER: Your Honor, TQ Delta --

09:56:34 20 THE COURT: And actually, just on a different
09:56:37 21 point, what is the relief you actually seek? I say that
09:56:43 22 because the proposed order that came in, which I apparently
09:56:48 23 now misplaced with the original brief, proposed that I order
09:56:56 24 TQ Delta to withdraw or dismiss without prejudice its action
09:57:00 25 against Zyxel, essentially I guess ending the case in the

09:57:10 1 U.K.

09:57:10 2 MS. RADER: Well, we think it's not ending the
09:57:13 3 case. They could always refile since it's without
09:57:16 4 prejudice.

09:57:16 5 THE COURT: All right. So does that impact what
09:57:17 6 you are saying that the law suggests that I have the power
09:57:19 7 and discretion to do right now?

09:57:24 8 MS. RADER: I would say you have the power and
09:57:26 9 discretion to enter that injunction.

09:57:28 10 THE COURT: All right. And so that's what you
09:57:32 11 are seeking, that the injunction is to direct them to
09:57:34 12 withdraw or dismiss the case in the U.K.?

09:57:37 13 MS. RADER: Until such time as the issues that
09:57:39 14 are common to both cases can be resolved by this Court.

09:57:42 15 THE COURT: All right. So on a slightly
09:57:47 16 different topic -- I will get back to that. Go ahead.

09:57:54 17 MS. RADER: TQ Delta does not deny that it's
09:57:58 18 suing ZyXel in the U.K. because it is trying to get a remedy
09:58:02 19 that it cannot get in this court, the so-called FRAND
09:58:04 20 injunction, and that means based on Unwired Planet, if they
09:58:07 21 win on even one patent, the U.K. Court will determine a
09:58:11 22 FRAND license covering the whole TQ Delta DSL portfolio, and
09:58:18 23 it is worldwide. In that case, ZyXel wouldn't have the
09:58:22 24 luxury to wait and see if an injunction issued in the U.K.
09:58:25 25 or be enforceable in this court or other U.S. courts.

09:58:27 1 THE COURT: Do you think this injunction is
09:58:29 2 likely to issue under the worst case scenario before the
09:58:32 3 spring of 2019?

09:58:36 4 MS. RADER: I guess it could come out as soon as
09:58:40 5 January '19 under the worst case scenario.

09:58:42 6 THE COURT: All right.

09:58:43 7 MS. RADER: Obviously, we would hope to win on
09:58:46 8 the two patent on the liability issue.

09:58:47 9 THE COURT: Which might moot the whole thing.

09:58:50 10 MS. RADER: Indeed, but it's the threat hanging
09:58:52 11 over us that's causing irreparable harm, especially if our
09:58:55 12 customers were to find out about it and get nervous.

09:58:58 13 THE COURT: Is the proceeding a written secret?

09:59:01 14 MS. RADER: No.

09:59:02 15 THE COURT: So if your customers care, why would
09:59:07 16 they find out already?

09:59:08 17 MS. RADER: I'm not sure, but they have not.

09:59:10 18 THE COURT: Who are your customers? I mean, I
09:59:13 19 take it they're not Joe Q Public?

09:59:16 20 MS. RADER: They're mostly large ISPs or medium
09:59:21 21 sized ISPs, Internet service providers.

09:59:24 22 THE COURT: Right. Right. All right. Go
09:59:27 23 ahead.

09:59:27 24 MS. RADER: So we also think that the courts in
09:59:33 25 the European Union are likely to enforce U.K. issued

09:59:36 1 injunction, so getting an injunction would effectively be an
09:59:40 2 injunction all through Europe. So --

09:59:43 3 THE COURT: And under the best or worst case, or
09:59:47 4 under any case scenario, the limits of my authority are
09:59:53 5 pretty much the United States. Right?

09:59:56 6 MS. RADER: Correct. But TQ Delta is a United
10:00:00 7 States company, so they're under your jurisdiction.

10:00:02 8 THE COURT: Right. But, in other words, if
10:00:03 9 you're busy violating E.U. law, or more to the point, U.K.
10:00:08 10 law, and including that a patent, as I understand it, is
10:00:16 11 asserted against you that has not even got a counterpart
10:00:20 12 that's at issue here, don't they have an interest in
10:00:23 13 figuring out whether or not you do infringe it?

10:00:25 14 MS. RADER: The U.K. Court, yes, they do, but,
10:00:29 15 in fact, we believe that we are licensed anyway and that the
10:00:33 16 terms just need --

10:00:34 17 THE COURT: So you have defenses. That's what
10:00:36 18 litigation is for. Right?

10:00:39 19 MS. RADER: Right. So the harm that's
10:00:43 20 threatened to ZyXel could not be easily remedied after the
10:00:47 21 fact, but this Court does have the power to put the U.K.
10:00:50 22 action on hold just like the courts in Microsoft and
10:00:53 23 Realtek. The methodology for calculating royalties is also
10:01:02 24 different in the United Kingdom.

10:01:07 25 THE COURT: So if they have a different

10:01:09 1 methodology for calculating royalties -- well, never mind.

10:01:15 2 Go ahead.

10:01:15 3 MS. RADER: My point is just that this case was
10:01:18 4 brought here under U.S. law four years ago and it should
10:01:21 5 stay here, not be decided. This is a dispute between, it
10:01:25 6 used to be four, now three U.S. companies, so the center of
10:01:29 7 it is here even if there are a few U.K. patents asserted in
10:01:32 8 the U.K.

10:01:33 9 I'd like to read some language from the IP
10:01:38 10 Common Policy. Recommendations and deliverables, and those
10:01:42 11 are standards, are non-binding. Their objective is to
10:01:44 12 ensure compatibility of technology of their systems on a
10:01:47 13 worldwide basis. To meet this objective, which is the
10:01:51 14 common interest of all participating, it must be ensured
10:01:54 15 that recommendations and deliverables, their applications,
10:01:57 16 et cetera, are accessible to everybody.

10:02:04 17 And that's the reason that the majority of U.S.
10:02:06 18 courts that have considered this issue have concluded that a
10:02:08 19 holder of patent alleged to be standard essential -- and
10:02:10 20 that's alleged, they don't even have to be proved to be
10:02:13 21 standard essential -- cannot sue for injunctive relief
10:02:16 22 absent certain circumstances that aren't present here.

10:02:22 23 This is not a case where anybody says ZyXel is
10:02:25 24 guilty of holdout, and that is because TQ Delta didn't even
10:02:29 25 offer rates and terms to ZyXel before suing.

10:02:32 1 THE COURT: Well, so according to something, I
10:02:35 2 think Mr. Dorsney submitted it, but there was a copy of the
10:02:39 3 English Court's, or British Court's, the U.K. Court's
10:02:44 4 approved judgment, which I gather was from November 21st,
10:02:50 5 and Justice, the Justice said that they, TQ Delta made an
10:03:05 6 offer 26 May 2016, which is like a year-and-a-half ago, for
10:03:10 7 a global portfolio license which was rejected, and they say
10:03:14 8 that you made an offer for a global portfolio license which
10:03:19 9 has also been rejected. I take it that was some time after
10:03:24 10 May 26, 2016.

10:03:28 11 Is that all correct?

10:03:30 12 MS. RADER: I believe that is correct. I think
10:03:31 13 we admitted that in the U.K. case, but in this case, they
10:03:35 14 filed late in December 2013.

10:03:38 15 THE COURT: That's true.

10:03:41 16 MS. RADER: Before any concrete license had been
10:03:43 17 offered to us. They came to us and said, we think you'll
10:03:47 18 take an interest in this license to the standard essential
10:03:49 19 patents, you're practicing the standard. And so we came
10:03:54 20 back, said, yes, we'd like to talk about a license.

10:03:57 21 They said, tell us about your sales figures,
10:03:59 22 tell us about your profits, tell us about your costs so we
10:04:02 23 know what terms we can propose. They wanted to get a little
10:04:05 24 free discovery before filing.

10:04:06 25 We came back and said, we want an NDA, and then

10:04:09 1 the parties were negotiating the terms of an NDA for a few
10:04:12 2 months and then TQ Delta got tired of waiting. Perhaps they
10:04:16 3 already wanted to bring the 2Wire suit and the Zhone suit
10:04:20 4 and the Adtran suit at the same time. They gave us an
10:04:25 5 ultimatum and said, resolve the NDA by the day after
10:04:29 6 Thanksgiving weekend.

10:04:30 7 THE COURT: Yes. I remember that.

10:04:31 8 MS. RADER: Okay.

10:04:31 9 THE COURT: I'm not saying -- I'm just saying I
10:04:34 10 do remember that because, I don't know, the usual.

10:04:38 11 Well, so one of the questions that comes up is
10:04:44 12 why -- I mean, this has nothing to do, really, I guess, with
10:04:49 13 the motion today, but if they're busy making you an offer in
10:04:55 14 2016 and you made them an offer somewhere along the line,
10:05:01 15 why don't you all agree to an arbitrator or something and
10:05:04 16 let the arbitrator figure out where to split the difference
10:05:09 17 and resolve the matter.

10:05:10 18 MS. RADER: I'm not sure that's what anyone
10:05:13 19 wants. I mean, the parties have occasionally been
10:05:15 20 discussing settlement, but it hasn't gotten anywhere.

10:05:19 21 THE COURT: Right. Well, I mean, you know, I
10:05:24 22 have not figured out when the latest, how long this
10:05:26 23 litigation is going to last if it lasts until the end. I
10:05:30 24 gather the U.K. litigation might, the immediate might end
10:05:37 25 some time soon, but I gather, I saw somewhere in here that

10:05:42 1 if for some reason these two patents that are asserted fall
10:05:45 2 by the wayside, TQ Delta probably has more, so there's a
10:05:52 3 prospect of litigation into the future there, too.

10:06:00 4 If you can't negotiate a solution, why don't you
10:06:02 5 get some help?

10:06:03 6 MS. RADER: Actually, the scheduling order
10:06:06 7 states the case is referred for mediation, but for some
10:06:09 8 reason, nothing has ever come of that.

10:06:15 9 THE COURT: I don't know about that. All right.
10:06:17 10 Well, go ahead.

10:06:19 11 MS. RADER: So I was just reading you the public
10:06:21 12 policy of the ITU, and I was going to say that there's no
10:06:25 13 holdout here, so there's no exception to the general rule
10:06:27 14 that you can't get an injunction if you're asserting
10:06:30 15 supposedly standard essential patents. And enforcing these
10:06:35 16 policies is an important public interest. The U.S. is an
10:06:40 17 innovation economy. These issues are terribly important
10:06:42 18 worldwide, and you can't have standard setting organizations
10:06:46 19 have interoperability of these technologies unless everybody
10:06:49 20 plays by the rules. And Aware, TQ's predecessor, made these
10:06:59 21 declarations and then they sold patents to somebody else who
10:07:01 22 has no interest in complying with those rules.

10:07:03 23 So the U.K. action never should have been filed
10:07:05 24 in the first place. And I guess because it's only involved
10:07:10 25 in two patents, TQ Delta learned that asserting 32 patents

10:07:15 1 was going to slow them down, they thought they could get the
10:07:18 2 same result with two patents and then get quickly to a FRAND
10:07:23 3 determination. They jumped ahead of us. And we said, why
10:07:27 4 couldn't it be resolved in January of 2019 unless you do
10:07:30 5 something about it.

10:07:31 6 THE COURT: So let's assume for the sake of
10:07:33 7 argument that the U.K. Court gets to January 2019 and issues
10:07:38 8 some judgment saying that a FRAND rate is X and they issued
10:08:06 9 an injunction against TQ Delta, I'm sorry, against you that
10:08:14 10 included the United States, that you couldn't sell any
10:08:18 11 products in the United States or in the U.K. at the
10:08:23 12 worldwide FRAND rate. Would you agree that I would then be
10:08:27 13 bound by that?

10:08:28 14 MS. RADER: No, we don't.

10:08:31 15 THE COURT: Okay.

10:08:32 16 MS. RADER: But if we like the rate, we might
10:08:34 17 well take that license.

10:08:38 18 THE COURT: I'm sorry. I'm sorry. Could you
10:08:40 19 repeat that again?

10:08:41 20 MS. RADER: If we thought the U.K. issued FRAND
10:08:45 21 license rates and terms that were fair and reasonable, then
10:08:49 22 we have no reason not to take that. But if they were
10:08:53 23 unreasonable, I think we would have a good argument that
10:08:56 24 they wouldn't apply here even if the U.K. says they do. But
10:09:01 25 just enjoining our products to keep them out of the U.K. is

10:09:04 1 a huge sacrifice. That's a big market for us.

10:09:07 2 THE COURT: But, I don't know. I mean, it seems
10:09:13 3 to me, and maybe I'm wrong, but it seems to me that the U.K.
10:09:17 4 ought to be the one who gets to decide whether or not you
10:09:21 5 can sell products in the U.K. Right? Not me.

10:09:26 6 MS. RADER: I agree with that and that's why
10:09:29 7 we're asking that this just be enjoined while this Court is
10:09:32 8 working on the breach of contract issues, which may include
10:09:36 9 the, very likely include the FRAND rates and terms. After
10:09:40 10 that, absolutely. The U.K. Court should decide the U.K.
10:09:43 11 patent issues.

10:09:53 12 THE COURT: So let's assume for the sake of
10:09:59 13 argument -- so let me ask you this: One of the things that
10:10:05 14 seems to be suggested by the case from Philadelphia with
10:10:11 15 Judge Rufe and which seems to also be suggested in the last
10:10:18 16 page of your reply brief is that it's really premature to be
10:10:25 17 talking about this now? That there's things that could
10:10:29 18 happen between now and January of 2019, not the least of
10:10:35 19 which seems to be the possibility that the U.K. trial on
10:10:40 20 infringement may -- could go either way, and that the whole
10:10:49 21 thing might become moot.

10:10:51 22 If I followed the logic of Judge Rufe, who after
10:10:55 23 all was interpreting at least the same Third Circuit law
10:11:01 24 that I should be interpreting, wouldn't that suggest that I
10:11:03 25 do nothing now and wait to see what happens even if I agree

10:11:10 1 that somewhere down the road I should be entering an
10:11:12 2 injunction?

10:11:13 3 MS. RADER: I would say it's distinguishable
10:11:15 4 from the case in front of Judge Rufe, and the reason is that
10:11:20 5 I don't think they were faced with a threat of an injunction
10:11:22 6 in the, in that case.

10:11:25 7 THE COURT: No. They were faced with a default
10:11:27 8 judgment, but as Judge Rufe said, she respected the U.K.
10:11:33 9 Court to do justice, and I certainly would be inclined to
10:11:48 10 have the same approach. But she also said that when
10:11:58 11 circumstances were advanced and perhaps changed, she still
10:12:02 12 had some arrows in her quiver and could address the problems
10:12:09 13 then. I.

10:12:10 14 Mean, when you talk about comity, which seems to
10:12:15 15 be a big concern, doesn't that suggest not rushing in at the
10:12:25 16 first sign of smoke should shouldn't you wait until you see
10:12:32 17 whether there's actually a fire?

10:12:34 18 MS. RADER: I think if you wait to see when
10:12:35 19 there's a fire, it's too late. Once there has been a fire,
10:12:38 20 you can't build a house back again, and that's what we're
10:12:40 21 looking at here. The whole point of the IT public policy is
10:12:43 22 to prevent the threat of an injunction from helping the
10:12:46 23 patentholder force the settlement just because of having a
10:12:52 24 lever like threat of an injunction. So that's why this case
10:12:56 25 is different. The defendant in Judge Rufe's case was

10:13:00 1 basically it sounds like brought into the lawsuit so he
10:13:03 2 would be a witness. He was judgment proof. He couldn't
10:13:05 3 defend himself in the U.K. case. So I mean I think Judge
10:13:09 4 Rufe came to a right decision, but I don't think that
10:13:13 5 controls what should happen in this case.

10:13:15 6 THE COURT: All right. What's the relationship
10:13:29 7 between the parties that are actually defendants in the U.K.
10:13:35 8 and the two parties that are defendants here?

10:13:38 9 MS. RADER: ZyXel Communications Corporation,
10:13:42 10 which is one of the defendants here, is a parent company to
10:13:45 11 the ZyXel Denmark and ZyXel, Inc., which is in Anaheim,
10:13:53 12 California, and I think ZyXel U.K. is a subsidiary of the
10:13:57 13 Denmark entity.

10:13:58 14 THE COURT: And the ones who are defendants in
10:14:00 15 the U.K. are the ZyXel Denmark and ZyXel U.K.?

10:14:05 16 MS. RADER: Correct.

10:14:09 17 THE COURT: All right. And do you agree that
10:14:13 18 the two patents that are asserted in the U.K., one of them
10:14:15 19 does not have a counterpart here?

10:14:18 20 MS. RADER: I think it has a counterpart in the
10:14:19 21 same family.

10:14:21 22 THE COURT: But not a counterpart that's
10:14:22 23 asserted?

10:14:24 24 MS. RADER: I'm not a patent -- I mean, I'm not
10:14:27 25 a patent prosecutor, so sometimes the term counterpart is a

10:14:31 1 little confusing to me. It's related. I don't want to
10:14:34 2 overstate.

10:14:35 3 THE COURT: Okay. And the one that is
10:14:39 4 apparently more closely related, do you know what its, if
10:14:46 5 you're comfortable with the term in this situation, what its
10:14:49 6 counterpart is supposed to be?

10:14:50 7 MS. RADER: I want to say it's in Family 5, but
10:14:54 8 I'm not a hundred percent sure on that.

10:14:58 9 THE COURT: All right. Anything else?

10:15:04 10 MS. RADER: Sure. We recognize that the Third
10:15:08 11 Circuit standard is different than the Ninth Circuit
10:15:11 12 standard and that we have a tougher time making this
10:15:13 13 argument even though our facts are really, really
10:15:16 14 compelling, and we think the Ninth Circuit cases are really
10:15:19 15 important and persuasive, and that's why we cited them.
10:15:23 16 But in the alternative, this Court could take some steps to
10:15:27 17 take some of these issues back and put them on a faster
10:15:30 18 track.

10:15:31 19 THE COURT: Yes. I'm not going to do that.

10:15:35 20 Actually, I remember the other question I had in
10:15:39 21 mind here, which was, the U.K. Justice in the Court of
10:15:45 22 Chancery, is he something that presumably if his judgments
10:15:54 23 are in error, there's somebody that you can appeal it to?

10:16:01 24 MS. RADER: Yes, Your Honor. I understand that
10:16:03 25 the Unwired Planet case is up on appeal now.

10:16:07 1 THE COURT: So the law in Britain may not even
10:16:10 2 be what is -- what it is stated to be in the Unwired Planet
10:16:17 3 case?

10:16:19 4 MS. RADER: Anything could happen on appeal, but
10:16:22 5 I think the best way to win an appeal is to win the District
10:16:27 6 Court level case, and so we feel like the threat is here
10:16:29 7 now, sure. Anything could happen in the future, but the
10:16:32 8 threat of an injunction is the problem here, and that's
10:16:34 9 what's inconsistent with U.S. public policy.

10:16:38 10 THE COURT: Okay. And maybe I missed this.
10:16:53 11 Justice Carr, he's not the author of the Unwired Planet
10:16:57 12 decision, is he?

10:16:59 13 MS. RADER: No, he's not.

10:17:00 14 THE COURT: Okay. But he's just like Judge
10:17:02 15 Stark over there. He sits on the same Court as the Justice
10:17:07 16 who decided that?

10:17:09 17 MS. RADER: Exactly.

10:17:10 18 THE COURT: Okay.

10:17:11 19 MS. RADER: And all the parties in the case
10:17:12 20 management conference, which we provided the transcript of,
10:17:18 21 I really was cautious of the Unwired Planet case. In fact,
10:17:22 22 TQ Delta said that was one of the reasons why they filed in
10:17:25 23 the U.K.

10:17:26 24 THE COURT: Okay. Anything else?

10:17:29 25 MS. RADER: If there's no further questions, I

10:17:30 1 will submit, or reserve rebuttal.

10:17:33 2 THE COURT: All right. Go ahead. Mr. Murphy?

10:17:37 3 MR. MURPHY: Thank you, Your Honor. Good

10:17:43 4 morning.

10:17:43 5 Judge, we cited quite a few cases in our brief

10:17:45 6 that we have hard copies of. If the Court would like a

10:17:48 7 copy, I have copies to hand up to the Court.

10:17:51 8 THE COURT: I saw the hard copy of BroTech. I

10:17:56 9 assume the rest are available?

10:17:58 10 MR. MURPHY: They are all available, Judge. No?

10:18:01 11 Okay.

10:18:02 12 Judge, as you alluded to originally here, what

10:18:06 13 ZyXel is requesting is extreme relief. They are asking this

10:18:11 14 Court to grant an anti-suit injunction that will completely

10:18:14 15 shut down U.K. litigation to enjoin a U.K. Court from the

10:18:19 16 course of U.K. patents to stop infringement in the U.K.

10:18:22 17 It's an extreme remedy that this Court in the General

10:18:27 18 Electric case has said, quote, "Should almost always be

10:18:29 19 avoided."

10:18:32 20 And as you also alluded to, Judge, under Third

10:18:36 21 Circuit precedent, and, again, the Third Circuit has stated

10:18:39 22 that these parallel proceedings should always be allowed to

10:18:43 23 proceed at least until a judgment is won in one, set up as

10:18:48 24 res judicata to the other.

10:18:49 25 So, again, you mentioned it's premature,

10:18:52 1 certainly at least premature, and we agree. ZyXel, bottom
10:18:56 2 line though here, Judge, has failed to show any of the
10:18:58 3 prerequisites for an anti-suit injunction under the Third
10:19:02 4 Circuit's restrictive approach, it announced in the General
10:19:06 5 Electric case.

10:19:09 6 The first prerequisite is that the enjoining
10:19:11 7 Court have the same parties and be dispositive of the
10:19:15 8 enjoined Court, and ZyXel does not even argue or assert that
10:19:21 9 that is the case. So the first prerequisite is not met.
10:19:25 10 But if that prerequisite is met, then ZyXel would have to
10:19:30 11 argue that the U.K. litigation threatens jurisdiction of
10:19:33 12 this Court or threatens the important public policy of the
10:19:36 13 United States, and they fail to do those things as well.

10:19:40 14 THE COURT: I mean, I think they say that the
10:19:45 15 important public policy is that standard essential patents
10:19:51 16 shouldn't be used or shouldn't be the basis of an
10:19:55 17 injunction. Right? Isn't that what they are saying?

10:19:58 18 MR. MURPHY: That is one of the things they're
10:19:59 19 saying, Judge, and there are two responses to that. One is,
10:20:04 20 the FRAND bargain, if you will, is an important public
10:20:07 21 policy, but here, they mischaracterize the threat of an
10:20:11 22 injunction. There's a -- they say there's a policy in the
10:20:16 23 United States against injunctions for standard essential
10:20:20 24 patent holders, and as we've seen in the Federal Circuit
10:20:23 25 case that we cite to Your Honor, that's the Apple versus

10:20:26 1 Microsoft case, that says that there is no blanket
10:20:31 2 prohibition on injunctions for standard essential patent
10:20:34 3 holders. It's one element that goes into the standard
10:20:41 4 elements when looking at Rule 65, looking for an injunction,
10:20:45 5 whether or not to apply an injunction is just one more
10:20:48 6 factor. So there is no U.S. public policy against
10:20:50 7 injunctions for SEP holders. So that is not an important
10:20:56 8 public policy that could possibly be threatened by the U.K.
10:20:59 9 litigation. And this Judge, this Court Judge will decide
10:21:04 10 for itself those issues. The U.K. action will not impose
10:21:10 11 its will on this Court, so there's no threat to that public
10:21:14 12 policy whatsoever in this court.

10:21:19 13 But just to address one quick point, Judge. The
10:21:26 14 parties, excuse me, the defendant has asserted that there
10:21:31 15 is, isn't a prerequisite for the parties being the same
10:21:35 16 or --

10:21:36 17 THE COURT: I'm sorry. Did you say -- did you
10:21:37 18 cite Apple versus Microsoft as a Federal Circuit case?

10:21:42 19 MR. MURPHY: Yes.

10:21:43 20 THE COURT: Do you mean like versus Motorola?

10:21:45 21 MR. MURPHY: I'm sorry, Judge. Apple versus
10:21:47 22 Motorola, yes.

10:21:48 23 THE COURT: Okay.

10:21:49 24 MR. MURPHY: Sorry, Judge.

10:21:53 25 THE COURT: That's all right.

10:21:54 1 MR. MURPHY: Right. The Federal Circuit holding
10:21:56 2 that there is no blanket prohibition.

10:22:03 3 ZyXel argued that there is no initial
10:22:08 4 prerequisite for this case being dispositive of the U.K.
10:22:12 5 litigation to be entitled to an anti-suit injunction, but in
10:22:17 6 the General Electric case, Judge, where the Third Circuit
10:22:21 7 re-ratifies, if you will, the restrictive approach for
10:22:24 8 anti-suit injunctions, that case cites to the Second Circuit
10:22:27 9 and the Sixth Circuit cases, which state that standard and
10:22:31 10 state that the Second Circuit, the China Trade case, which
10:22:34 11 is cited at 837 F.2d at 36, where that Court identifies the
10:22:41 12 restrictive approach and says, we agree with the two
10:22:44 13 threshold requirements. One is the parties are the same;
10:22:48 14 and, two, whether the enjoining Court will be dispositive of
10:22:52 15 the enjoined Court. So there is that prerequisite for even
10:22:57 16 getting to the next prongs of the anti-suit injunction
10:23:00 17 factors.

10:23:08 18 THE COURT: Is it your position that the two
10:23:09 19 U.K. subsidiaries, or the two U.K. defendants, I guess is a
10:23:13 20 better word, they are not the same party, the same party as
10:23:22 21 the same parties here?

10:23:23 22 MR. MURPHY: Well, they are slightly different,
10:23:24 23 Judge, but they are all in the same family. We recognize
10:23:27 24 that. They're all related entities.

10:23:30 25 But here, the difference here, Judge, is the

10:23:30 1 reason this case would not be dispositive of that is the
10:23:33 2 lack of complete overlap of patented technology. You
10:23:37 3 mentioned it earlier. The patents, of course, in the U.K.
10:23:41 4 litigation are just U.K. patents. Here, they are just U.S.
10:23:44 5 patents, one of which in the U.K. is related to Family 5, as
10:23:47 6 you mentioned. The other patent asserted in the U.K.
10:23:51 7 presently is not what we would call Family 11, if you will,
10:23:55 8 but it's not asserted here. So there's no complete overlap
10:23:58 9 of technology or of patents.

10:24:01 10 THE COURT: So your position or view is one of
10:24:05 11 the asserted U.K. patents essentially has the same
10:24:08 12 limitations as one of the asserted Family 5 patents?

10:24:11 13 MR. MURPHY: Not the same limitations, Judge.
10:24:13 14 The same related specification based on the same technology,
10:24:16 15 but as you -- the patent law is different in the U.K., so
10:24:20 16 the claims would be a little different.

10:24:21 17 THE COURT: All right. And the other one, you
10:24:24 18 mentioned Family 11. I thought it was -- are you saying
10:24:29 19 it's related in some way to the Family 11 patents?

10:24:33 20 MR. MURPHY: Oh, I'm sorry, Judge.

10:24:35 21 THE COURT: Are there Family 11 patents?

10:24:37 22 MR. MURPHY: No. That's just our sort of how we
10:24:39 23 refer to it. And here in Delaware, there are only Families
10:24:42 24 1 through 10. I believe the ZyXel case deals with Families
10:24:45 25 1 through 9, if I have that right.

10:24:47 1 THE COURT: Okay.

10:24:47 2 MR. MURPHY: And so my point being that there's,
10:24:49 3 yes. The second patent in the U.K. litigation is not in any
10:24:53 4 way involved in these cases here.

10:24:54 5 THE COURT: All right.

10:24:56 6 MR. MURPHY: And so -- excuse me, Judge.

10:25:00 7 MR. McANDREWS: Sorry, Your Honor.

10:25:01 8 (Pause while counsel conferred.)

10:25:05 9 MR. MURPHY: And so the U.K. patent that's
10:25:12 10 outside the families here, TQ Delta doesn't even own a
10:25:17 11 counterpart in the U.S. for that patent. It's only in the
10:25:20 12 U.K. So, in other words, the point being that this case
10:25:26 13 won't be dispositive of the U.K. litigation and ZyXel
10:25:29 14 doesn't even argue that it would be, and so we don't get
10:25:31 15 past that first prerequisite for any anti-suit injunction.

10:25:39 16 Importantly, Judge, there is no threat to this
10:25:43 17 Court's jurisdiction from the U.K. litigation. As the
10:25:46 18 restrictive approach from the Third Circuit states, that's
10:25:48 19 one of the prongs that must be shown to be entitled to an
10:25:52 20 anti-suit injunction. There's no threat to the jurisdiction
10:25:55 21 here. The best that ZyXel argue is that the RAND issues in
10:26:01 22 the U.K. litigation may be decided first. They don't --

10:26:06 23 THE COURT: So what is your understanding of
10:26:12 24 what, in terms of RAND issues in the U.K. litigation, do --
10:26:26 25 what is your understanding of how much the issues there

10:26:31 1 overlap with the issues here?

10:26:32 2 MR. MURPHY: My understanding, Judge, is that
10:26:35 3 there's a fair bit of overlap between the FRAND bargain and
10:26:39 4 those issues that are related to that FRAND bargain.
10:26:43 5 However, they'll be applied locally by the U.K. litigation,
10:26:46 6 applying its U.K. jurisprudence, just like this Court will
10:26:49 7 apply the FRAND issues with the obligations, commitments of
10:26:54 8 the parties using U.S. jurisprudence.

10:26:56 9 THE COURT: So to the extent that the FRAND
10:27:02 10 obligation is based on some idea of the contract law and so
10:27:13 11 there's interpretation of a contract, what law am I supposed
10:27:20 12 to apply, what law is the U.K. supposed to apply to figure
10:27:23 13 out those issues?

10:27:24 14 MR. MURPHY: I can't speak to the U.K. law,
10:27:29 15 Judge. We've talked to our, of course, our lawyers in the
10:27:33 16 U.K. They'll apply a different law, I think the U.K.
10:27:38 17 contract law.

10:27:39 18 I will give you an analogy, Judge. In the
10:27:41 19 Microsoft/Motorola case that ZyXel relies on nearly
10:27:49 20 exclusively, in that case, the Court entered that injunction
10:27:51 21 against a proceeding for filing the bond for, in a German
10:27:56 22 Court, and one of the reasons it did that is because in
10:27:59 23 Germany, at least at that time, German courts did not
10:28:02 24 recognize third-party beneficiaries, and so Microsoft was
10:28:06 25 the implementer. They got the benefit of the FRAND bargain

10:28:10 1 as a third-party beneficiary here in the United States. The
10:28:13 2 Court recognizes that right if they meet certain
10:28:17 3 prerequisites and Microsoft met those prerequisites, and so
10:28:22 4 they're a third-party beneficiary able to assert those
10:28:25 5 contractual rights. In Germany, that's not allowed. So
10:28:28 6 that's why the different courts will look at different
10:28:30 7 things. In the U.K., we don't have that problem. The U.K.
10:28:34 8 as we know from the Unwired Planet case did an exhaustive
10:28:38 9 analysis of the FRAND issues and gave great respect to both
10:28:43 10 sides in showing commitment and obligations to both sides
10:28:46 11 trying to reach a FRAND reasonable and non-discriminatory
10:28:49 12 rate based on all circumstances. And so the U.K. will apply
10:28:54 13 as law, but it's very similar to ours, and there's no threat
10:28:58 14 to our jurisdiction or any policies, any FRAND policies in
10:29:02 15 the United States, because not only do they show respect for
10:29:05 16 the FRAND bargain, but this Court will also be able to apply
10:29:08 17 its sole discretion in how it interprets the FRAND
10:29:11 18 relationships.

10:29:17 19 THE COURT: Do you think the U.K. Court has the
10:29:20 20 power to enter an injunction that would have affected the
10:29:31 21 United States?

10:29:32 22 MR. MURPHY: I don't think -- my understanding,
10:29:35 23 Judge, is that a U.K. injunction is limited to the
10:29:38 24 geographic territory of the U.K., just as I think a U.S.
10:29:42 25 injunction is limited to the geographic territory of the

10:29:46 1 United States.

10:29:49 2 THE COURT: Do you have any authority for that
10:29:52 3 assertion?

10:29:53 4 MR. MURPHY: Judge, I wish I did. I've talked
10:29:55 5 to our U.K. lawyers about that. I don't have a citation for
10:29:59 6 you under U.K. law, but that is my understanding, that any
10:30:04 7 U.K. injunction will be limited to the geographic area of
10:30:08 8 the U.K.

10:30:10 9 THE COURT: So if you're right about that, then
10:30:18 10 your view is that an injunction -- if the U.K. Court
10:30:29 11 eventually entered an injunction against ZyXel Denmark and
10:30:33 12 ZyXel U.K., that would have -- you know, leave aside
10:30:47 13 questions of supply chain and things like that, but it would
10:30:50 14 have essentially no effect on the ability of the two
10:30:53 15 defendants in this case to sell, offer for sale, manufacture
10:30:58 16 in the U.S. whatever it is they do that you say infringes.
10:31:03 17 It would have no impact on that?

10:31:05 18 MR. MURPHY: You know, Judge, I can't give you a
10:31:08 19 straight answer to that. I don't know how an injunction
10:31:11 20 could be, you know, written in the U.K. that may or may not
10:31:16 21 have such an effect on any activities in the United States,
10:31:21 22 but we do know from things like the Brotech case that you
10:31:26 23 mentioned earlier, that there was a possibility of a default
10:31:29 24 judgment which presumably would turn into an injunction in
10:31:32 25 the U.K., and the District Court here said that doesn't

10:31:38 1 deprive the Court of jurisdiction, it doesn't warrant an
10:31:41 2 anti-suit injunction, because the Court here will look at
10:31:44 3 that and decide what it will in the U.S. And that's
10:31:48 4 important. This Court retains the ability to look at the
10:31:52 5 activities within its jurisdiction. So it still in that
10:31:55 6 case doesn't deprive anybody of jurisdiction or threaten any
10:31:59 7 public policy.

10:32:00 8 THE COURT: All right. What else do you have to
10:32:04 9 say?

10:32:05 10 MR. MURPHY: Pardon me, Judge?

10:32:06 11 THE COURT: Go ahead.

10:32:07 12 MR. MURPHY: Okay. And so on the issue of not
10:32:11 13 threatening jurisdiction, Judge, again, as the Brotech Court
10:32:16 14 said, quote, res judicata is not a doctrine which would
10:32:20 15 defeat subject matter jurisdiction, and so anything that
10:32:25 16 would happen in the ZyXel U.K. litigation doesn't deprive
10:32:29 17 this Court of jurisdiction, and so it can't support an
10:32:33 18 anti-suit injunction here.

10:32:35 19 The other issue, Judge, that parties argue, the
10:32:42 20 Third Circuit looks to for anti-suit injunctions is whether
10:32:45 21 or not there's a threat of an important public policy, and
10:32:47 22 again we're back to the FRAND issues that may get decided by
10:32:54 23 the U.K. litigation, and we talked about those.

10:32:56 24 Importantly, Judge, the only thing that ZyXel argues in its
10:32:59 25 brief is that they might be decided before the issues are

10:33:02 1 decided here. They don't state that those issues or
10:33:05 2 whatever decision happens to come out in the U.K. will be
10:33:09 3 imposed on this Court or this Court will not be able to
10:33:11 4 decide its own issues on the FRAND obligations and
10:33:17 5 framework. So again there's no threat to any public policy
10:33:19 6 in the United States.

10:33:21 7 U.K. laws will apply its own law, as you
10:33:24 8 mentioned, as you asked, and this Court will apply its own
10:33:27 9 laws to what the FRAND obligations are.

10:33:30 10 THE COURT: Ms. Rader said, and I'm sure she's
10:33:37 11 correct that the Unwired case is on appeal. Do you know
10:33:43 12 anything about the timing of that appeal?

10:33:46 13 MR. MURPHY: I do not, Judge. While Ms. Rader
10:33:53 14 has rebuttal, I will talk to co-counsel and see if I can get
10:33:56 15 an answer for you.

10:33:57 16 THE COURT: Okay.

10:33:57 17 MR. MURPHY: I know we talked to our local
10:33:59 18 counsel, our U.K. counsel about that, and I just don't
10:34:02 19 recall what he told us.

10:34:04 20 THE COURT: All right. All right. Go ahead.

10:34:15 21 MR. MURPHY: Okay. I think lastly, Judge, and
10:34:18 22 you alluded to it immediately when you came out here, is
10:34:21 23 that they're asking this Court to shut down a complete U.K.
10:34:27 24 litigation for patent infringement in the U.K. It's an
10:34:30 25 extremely broad and aggressive remedy that violates comity

10:34:36 1 and it also violates the Third Circuit's approach.

10:34:39 2 THE COURT: Yes. You know, I think that comity
10:34:40 3 issue is -- you know, one thing I noticed about Judge Rufe's
10:34:47 4 opinion was that the tone was very much respect for a,
10:34:58 5 what's essentially an equal court in a different country.

10:35:02 6 I'm not so sure how much -- well, never mind.

10:35:08 7 Go ahead.

10:35:13 8 MR. MURPHY: Show quite a bit of deference to
10:35:15 9 those courts. But as to -- the General Electric case even
10:35:19 10 says, you know, that respect for comity encourages the rule
10:35:22 11 of law, and that's what we want. Parallel proceedings are
10:35:26 12 allowed at least until one is set up as res judicata in the
10:35:30 13 other, so it would be very premature. The injunction is
10:35:33 14 much too broad. Keep in mind here, it's important that
10:35:36 15 ZyXel relies principally on the Ninth Circuit case or the
10:35:39 16 Microsoft versus Motorola, but even in that case, as that
10:35:44 17 Court stated, it was a very, very narrow injunction, and all
10:35:46 18 it said was, it was going to stop Motorola from filing the
10:35:49 19 bond necessary.

10:35:50 20 THE COURT: Well, and, you know, I'm glad you
10:35:52 21 mentioned that, because I read the briefing and I have been
10:36:01 22 doing this long enough now so I ought to know where I should
10:36:05 23 start, and I should have started with the proposed order.
10:36:08 24 That's where I ended. And it seems to me that the proposed
10:36:12 25 order greatly exceeded what is defendant's best day could

10:36:28 1 possibly be entertained, because it seemed as though respect
10:36:33 2 for other Courts, and other Courts in other countries,
10:36:39 3 requires the narrowest possible injunction if you find it
10:36:45 4 necessary to issue one, and that here, the narrowest
10:36:50 5 possible injunction is probably something like that the
10:36:57 6 injunction -- any injunction that were to be issued would
10:37:02 7 have no territorial effect in the United States, something
10:37:07 8 like that. And I guess I'm actually the wrong person here.
10:37:16 9 But I take it you agree with that?

10:37:18 10 MR. MURPHY: We agree -- of course, we agree any
10:37:20 11 injunction --

10:37:21 12 THE COURT: I understand.

10:37:22 13 MR. MURPHY: But, yes. The very narrowest
10:37:24 14 possible injunction. But keep in mind, it was something
10:37:27 15 interesting Ms. Rader said. They said, well, if the rate is
10:37:30 16 right, then I guess the injunction would apply in the United
10:37:33 17 States. So they still want to hedge their bets.

10:37:36 18 THE COURT: Well, no. No. That's one of the
10:37:38 19 things, you know, Mr. Murphy, I expect the answer sitting at
10:37:41 20 the table, but you're the one that's standing up. If you
10:37:48 21 made a FRAND offer, they didn't think it was a FRAND offer,
10:37:53 22 they made a FRAND offer, you didn't think it was a FRAND
10:37:58 23 offer. Why don't you find some neutral party who can
10:38:06 24 quickly decide what a FRAND offer is and live with it?

10:38:10 25 I don't know how much money is actually at stake

10:38:13 1 here. Maybe it's, you know, nine figures or ten figures or
10:38:20 2 something, but it just seems -- if it's just hanging over
10:38:29 3 dollars here, pounds, or something, and there must be a
10:38:35 4 cheaper way to resolve this than the way that you are doing
10:38:37 5 it.

10:38:38 6 MR. MURPHY: Judge, part of the FRAND bargain
10:38:40 7 is, you know, the standard essential patent owner's
10:38:43 8 commitments, but it's also the commitments of the
10:38:45 9 implementers of the standards. ZyXel here doesn't even
10:38:48 10 acknowledge that our patents are standard essential. They
10:38:51 11 won't acknowledge that they practice the standard.

10:38:53 12 THE COURT: Well, but as the U.K. Judge said,
10:38:56 13 did they make you an offer at some point?

10:38:59 14 MR. MURPHY: You know, I was not part of this
10:39:01 15 negotiation. Mr. McAndrews can answer that more directly,
10:39:04 16 and I will try to answer the question, Judge. There was
10:39:06 17 some back and forth, but they effectively would not
10:39:09 18 negotiate with us in good faith.

10:39:11 19 THE COURT: No. I'm not asking. You know, make
10:39:16 20 that an issue for another day. I'm not interested in
10:39:19 21 getting the entire history, and maybe I should because I've
10:39:22 22 asked the question, but it just seemed to me that if, in
10:39:25 23 fact, as the U.K. Judge said, and I assume he, I mean, I
10:39:28 24 know he had a basis for saying it, is that both sides say
10:39:32 25 they have made an offer, and I'm just wondering if that's

10:39:38 1 actually correct, why instead of litigating on two
10:39:44 2 continents, parties don't figure out some way to get, to
10:39:50 3 reach that midpoint where, you know, which may not be a
10:39:53 4 midpoint rather than -- well, in any event, I'm not
10:40:03 5 expecting you to answer that, Mr. Murphy.

10:40:05 6 Mr. McAndrew, why don't you sit down for a
10:40:09 7 second.

10:40:09 8 MR. McANDREWS: Sure.

10:40:09 9 THE COURT: Let me finish this. Is there
10:40:13 10 anything else, Mr. Murphy.

10:40:15 11 MR. MURPHY: That's it. I'd like to take a
10:40:17 12 quick rebuttal.

10:40:18 13 THE COURT: Okay. Usually, a response, two,
10:40:19 14 three.

10:40:20 15 MR. MURPHY: Okay.

10:40:25 16 THE COURT: So why don't we do this. Why don't
10:40:29 17 you have a seat.

10:40:29 18 Mr. McAndrews, if there's stuff you want to
10:40:31 19 throw in on the collateral issues which is stuff that
10:40:35 20 Mr. Murphy has not dealt with, go ahead.

10:40:37 21 MR. McANDREWS: Yes, Your Honor, and I will be
10:40:37 22 as brief as I can be.

10:40:38 23 So on the question about the negotiations, and I
10:40:40 24 understand the Court's reluctance to get into too much what
10:40:42 25 may be 408 discussions between the parties, but one of the

10:40:45 1 major problems with the, with attempting to reach the
10:40:48 2 approach you described, which we believe would be a very
10:40:51 3 reasonable approach, the problem is that to the extent ZyXel
10:40:56 4 has offered anything, what they have offered is a rate, but
10:41:01 5 always couched in terms of, we will only pay that rate where
10:41:05 6 you have proven that you have an infringed patent that
10:41:10 7 remains valid in any jurisdiction on the planet. So the
10:41:13 8 rate only applies in each nook and cranny of the earth that
10:41:17 9 we then go and prove a full infringement case. And that's
10:41:21 10 not, that's not the FRAND bargain. The FRAND bargain is
10:41:24 11 that the parties want to arrive at a rate --
10:41:27 12 THE COURT: All right.
10:41:27 13 MR. McANDREWS: Okay. So there's that. I just
10:41:29 14 wanted to add one other thing, because maybe Ms. Rader can
10:41:32 15 address this. But you had asked a question about whether
10:41:34 16 there would be any impact of injunction entered in the U.K.
10:41:40 17 anywhere outside the U.K., and as Mr. Murphy said, our
10:41:43 18 understanding is that there will be no impact at all. And
10:41:45 19 we can, and if Your Honor would prefer, we can get some
10:41:48 20 authority from our U.K. counsel just to -- we can get that
10:41:52 21 in in the next couple days just to make sure that you
10:41:54 22 understand that to be the case. Our understanding though is
10:41:56 23 that an injunction entered in the U.K. would have no impact
10:42:00 24 outside the territory of the U.K., and including, and this
10:42:04 25 is why I wanted to say it before Ms. Rader gets up.

10:42:09 1 The products we understand are not made anywhere
10:42:11 2 near the U.K., and so products sold in the U.S. don't, are
10:42:15 3 not made in the U.K., so an injunction wouldn't impact them
10:42:18 4 that way and they don't transit through the U.K. is our
10:42:20 5 understanding. So an injunction in the U.K. would have zero
10:42:23 6 impact on U.K., on Zyxel's sales in the United States.

10:42:31 7 THE COURT: All right. Thank you,

10:42:32 8 Mr. McAndrews.

10:42:33 9 Ms. Rader?

10:42:35 10 MS. RADER: Thank you, Your Honor. I will try
10:42:40 11 to be brief.

10:42:41 12 My first point is at the beginning of
10:42:43 13 Mr. Murphy's argument, I heard a concession that I wasn't
10:42:46 14 expecting to get, that the enforcing RAND really is an
10:42:51 15 important public policy, so I just wanted to note that.
10:42:53 16 That's I guess no longer in dispute in this motion.

10:42:56 17 Second, speaking about the Apple versus Motorola
10:43:02 18 case, it is fairly important because it's a Federal Circuit
10:43:04 19 case. It did say there was no blanket per se rule against
10:43:08 20 denying an injunction, against granting an injunction, but
10:43:14 21 if you go on and read the next section of that case, it
10:43:17 22 actually upheld the denial of an injunction in the Apple
10:43:22 23 versus Motorola case. It did say you could apply the
10:43:25 24 traditional injunction factors asset out in eBay and that's
10:43:29 25 why we briefed those factors, including irreparable harm.

10:43:32 1 The third point I want to make is about the
10:43:37 2 restrictive approach. There are different species of
10:43:40 3 restrictive approach in the Third Circuit, the Second
10:43:43 4 Circuit and the Sixth Circuit. The General Electric case
10:43:46 5 just does not say that the first case has to be dispositive
10:43:51 6 of the second case. I've read it. I read the section that
10:43:54 7 is cited in TQ Delta's brief and then I went back and cite
10:44:00 8 checked it and read every Third Circuit case and every
10:44:03 9 District Court case that cites General Electric for the
10:44:06 10 anti-injunction suit point and they all don't set out any
10:44:12 11 kind of restrictive requirement that requires the one case
10:44:15 12 be dispositive of the other one. It's just not there. They
10:44:19 13 all talk about the res judicata point at that cite.

10:44:25 14 Your Honor asked a question about why we're not
10:44:28 15 going to arbitration or mediation. The answer is it's a
10:44:32 16 business decision, so it shouldn't have any effect on how
10:44:36 17 you decide this motion.

10:44:38 18 THE COURT: No. I think that's right.

10:44:40 19 MS. RADER: I think I have a factual correction
10:44:42 20 for TQ Delta. I wasn't involved in discussions of patent
10:44:48 21 negotiations myself, but I'm pretty confident that even
10:44:51 22 though our position in our pleadings is that we'll take a
10:44:54 23 FRAND license on patents that are proved to be essential,
10:44:58 24 valid and infringed, in the patent negotiations for a
10:45:01 25 license, everybody was talking about a global license for

10:45:04 1 all the patents in the portfolio.

10:45:07 2 THE COURT: That would certainly be the

10:45:09 3 reasonable business decision approach, I'm sure.

10:45:12 4 MS. RADER: Unless the Court has any further
10:45:14 5 questions, I will sit down.

10:45:17 6 THE COURT: I think I asked Mr. Murphy, and you

10:45:19 7 may actually not be in quite as good a position to even

10:45:24 8 answer, but do you have any sense of what the timing is for

10:45:26 9 this Unwired Planet appeal?

10:45:30 10 MS. RADER: No, I don't.

10:45:31 11 THE COURT: Okay.

10:45:31 12 MS. RADER: I have a sense it will take a long

10:45:34 13 time, but I don't know exactly what that means.

10:45:36 14 THE COURT: Okay. All right. And so

10:45:45 15 Mr. McAndrews said the U.K. counterparts say that the effect

10:45:59 16 of the injunction, if there were to be one, is limited to

10:46:02 17 the U.K., and he said he was supplied presumably from the

10:46:16 18 U.K. counterpart authority to back up that statement. Is

10:46:21 19 your position different?

10:46:26 20 MS. RADER: No. I think we would agree with

10:46:27 21 that, and we would certainly fight to prevent that

10:46:30 22 injunction from being enforced in the U.K.

10:46:32 23 THE COURT: Well, that enforcement in the U.K.,

10:46:34 24 that's definitely not my concern.

10:46:36 25 MS. RADER: I meant enforced in the U.S. I

10:46:39 1 misspoke.

10:46:39 2 THE COURT: Sorry. All right. So they are
10:46:44 3 saying it's only good in the U.K. You are saying you don't
10:46:49 4 want to see it at all, but if you do want to see it, you
10:46:52 5 want it to only apply to U.K. So, okay.

10:46:58 6 And do you agree with Mr. McAndrews' sort of
10:47:07 7 second point there, which is, so an injunction in the U.K.,
10:47:11 8 that may cause, or he didn't say this. That may cause large
10:47:18 9 business interruption, disruption for ZyXel U.K. and ZyXel
10:47:22 10 Denmark, but in terms of the product that you sell here,
10:47:33 11 they would not be impacted because they're not manufactured
10:47:36 12 in Great Britain and they don't transit Great Britain.

10:47:40 13 Do you have any reason to disagree with that?

10:47:42 14 MS. RADER: It's hard to assess the impact
10:47:44 15 except to say that ZyXel U.K. and ZyXel Denmark are part of
10:47:49 16 this larger ZyXel group.

10:47:51 17 THE COURT: But that is a different kind of
10:47:53 18 impact I think to say if we got an adverse judgment against
10:48:01 19 us in the U.K., that would hurt our sister companies, and
10:48:06 20 because they're all kind of related, it might hurt us, too.
10:48:10 21 That's one thing. It's a different thing, I think, to say
10:48:17 22 if the U.K. enjoined these two companies, that would disrupt
10:48:24 23 our operations in the U.S. because we could no longer get
10:48:28 24 materials made or we could no longer get materials
10:48:31 25 delivered?

10:48:32 1 Do you see what I'm saying?

10:48:34 2 MS. RADER: I see what you are saying, but the
10:48:37 3 fact is, these products are not designed country by country.
10:48:41 4 And the products sold in the U.K. I believe are made in
10:48:45 5 China and so they would have to change all kinds of
10:48:48 6 different products because --

10:48:51 7 THE COURT: Well, so, but if they change, you
10:48:53 8 know, if the manufacturing in China -- if you all wanted to
10:49:02 9 change it because you had an adverse judgment in the U.K.,
10:49:06 10 that would be just a business decision on your part, right,
10:49:11 11 as opposed to you manufacture these things outside of London
10:49:18 12 and your manufacturing plant gets shut down by an
10:49:26 13 injunction. That's really what I was driving at.

10:49:29 14 MS. RADER: Sure. I would say anything is
10:49:31 15 relative, but the threat to Zyxel Corporation includes this
10:49:35 16 huge sort of Damocles hold hanging over the U.K. I want to
10:49:43 17 point out that the Microsoft Court considered the threat in
10:49:46 18 Germany to be significant enough and to be a violation of
10:49:49 19 the ITU obligations. That was enough to grant an injunction
10:49:53 20 halting the German litigation for a while.

10:49:56 21 THE COURT: Okay. All right.

10:50:00 22 MS. RADER: Additionally, the remedy is the
10:50:03 23 Microsoft case included damages caused by the German action,
10:50:07 24 including Microsoft had to shut down one of its facilities
10:50:09 25 in Germany. So it's enough to make the Court take notice,

10:50:13 1 at least in the Microsoft case.

10:50:14 2 THE COURT: Okay. Thank you.

10:50:17 3 MS. RADER: Thank you.

10:50:18 4 THE COURT: All right. Well, so we're done.

10:50:23 5 Right?

10:50:24 6 MR. MURPHY: Yes, Your Honor.

10:50:25 7 THE COURT: Okay. So I'm going to take this

10:50:31 8 under advisement in the sense that I will write some order.

10:50:40 9 I doubt that it will be very long. And I don't think

10:50:45 10 there's any necessity for expedition, so it will happen in

10:50:53 11 due course. And so that's the end of that.

10:51:04 12 All right. So when is the next time now that

10:51:09 13 I'm supposed to see you, at least see you all? Is it like

10:51:13 14 some time like the second week of January?

10:51:15 15 MR. McANDREWS: January 10th, Your Honor.

10:51:16 16 THE COURT: Okay. And I recognize that two of

10:51:20 17 the three defendants are not here right now. I need to --

10:51:33 18 there were some scheduling issues, one of which was which

10:51:38 19 defendants were going to handle which formal Zhone trials,

10:51:45 20 and my impression is that the defendants amongst themselves

10:51:48 21 had worked out who they wanted to have handle which trial,

10:51:52 22 and I couldn't tell from the scheduling order, does TQ Delta

10:51:58 23 care which defendant handles which trial?

10:52:00 24 MR. McANDREWS: Your Honor, no, but with one

10:52:02 25 exception that would lead to some efficiency here. If you

10:52:05 1 recall, Adtran has explained to the Court, including when
10:52:10 2 they filed the motion for summary judgment on the issue of
10:52:13 3 license, they explained that the vast majority of their
10:52:16 4 products use Lantek/Intel chips as opposed to some of the
10:52:21 5 other chip suppliers.

10:52:23 6 THE COURT: Right.

10:52:23 7 MR. McANDREWS: And one of the patent families
10:52:25 8 that TQ Delta concedes that they have a license to for
10:52:29 9 Lantek chips is Family 4. It's also 4, 5 and 6. But the
10:52:34 10 families that they don't have a license to for which they
10:52:39 11 claim was the vast majority of the products at stake in the
10:52:41 12 case that use Lantek chips are Families 2, 8 and 9 and so
10:52:47 13 from TQ Delta's perspective, it would have been most
10:52:50 14 efficient to try 2, 8 and 9 against Adtran before we start
10:52:55 15 loading up to some of these less significant families like
10:52:58 16 Family 4 for them. So if we had a preference, we would have
10:53:05 17 2Wire and ZyXel divide up Family 4, 5 and 6, and then we
10:53:09 18 would wrap around --

10:53:11 19 THE COURT: But Adtran has some, so to speak,
10:53:15 20 interest in at least one of these families 4, 5 and 6,
10:53:18 21 whichever one it is they are going to do, because I presume
10:53:20 22 they're not going to go to trial over a family in which they
10:53:23 23 have no accused products.

10:53:25 24 MR. McANDREWS: I didn't mean to -- so they have
10:53:28 25 a few accused products, but the relative scale is, according

10:53:35 1 to Mr. Sykes, is, you know, three percent of the total of
10:53:39 2 their sales. The vast majority of what's at stake in the
10:53:43 3 case in Lantek.

10:53:45 4 THE COURT: All right. It seems to me I'm going
10:53:48 5 to let the defendants decide which order they do things, so
10:53:51 6 I'm going to go with defendants' suggestion on that.

10:53:54 7 Something else. I don't want to talk about it
10:53:57 8 because all the parties are not here right now, but I also
10:53:59 9 have to decide whether I'm going to rearrange trials 1, 2
10:54:02 10 and 3, and that is tied in with the, or possibly tied in
10:54:08 11 with the question of substituting patents.

10:54:16 12 Are there any other scheduling issues other than
10:54:20 13 those two that are left for me to decide?

10:54:25 14 MR. McANDREWS: I believe the parties are able
10:54:27 15 to work out essentially everything else. I think you picked
10:54:29 16 the two that --

10:54:30 17 THE COURT: Okay. All right. All right. Well,
10:54:33 18 thank you very much. Have a nice holiday. I will see you
10:54:36 19 all in the New Year.

10:54:37 20 (Hearing concluded at 11:05 a.m.)

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